DEVELOPING THE HEARING RECORD: WHEN AND HOW

IDEA IMPARTIAL HEARING OFFICER TRAINING – NEW YORK
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I. INTRODUCTION

A. A challenge most IDEA impartial hearing officers (IHO) face in fulfilling the role and responsibilities as an IHO is ensuring a complete record from which the IHO can make an informed decision regarding the presented issue(s). The IHO is tasked with ultimately deciding the presented issue(s) based on the evidence in the hearing record. But, what if the parties are not presenting sufficient evidence in the hearing record upon which to base a ruling?

Is there an obligation or responsibility on the part of an IHO to develop at least the minimal record necessary to determine the presented issue(s) regardless of whether either party is represented by an attorney? Or, is an IHO's function to solely take what is presented and let the knowledge and skill of the parties and their attorneys / advocates, if any, be determinative of the outcome?

Views among IHOs vary in this regard.

B. Let's be very clear. Where competent attorneys or educational advocates with special education experience are representing the parties, these questions should not present themselves often. But not all attorneys / educational advocates are created equal and, more importantly, not all parties are represented.

C. A discussion on the extent and manner in which an IHO may or must assist in an adversarial proceeding is, therefore, appropriate.[1]

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[1] Generally, there seems to be more appeal to an IHO offering assistance to a *pro se* parent. *See* Memorandum to Erlichman, et. al from Wamsley, *Judges, Administrative Law Judges, and Hearing Officers Ability, Extent, and Duty to*

II. NATURE AND PURPOSE OF IDEA HEARINGS

A. If the primary goal of the IDEA hearing process is to ensure that the educational rights of a child with a disability are upheld,[2] then to what extent, if any, does an IHO have a responsibility to take some steps to mitigate the potential adverse effect the lack of a complete record may have on the process while also achieving the IDEA's primary goal? And, if the IHO has a responsibility to ensure that the educational rights of a child with a disability are upheld, is an affirmative duty to develop /complete the record created?[3] Or, is the role of an IHO just to sit back and act as an umpire calling balls and strikes but not overly intruding into the process of developing / completing the record?[4]

B. If an IHO agrees that the very nature of the IDEA hearing process places upon him or her the responsibility to take some steps, the concern often then is how to balance maintaining impartiality while participating in the development / completion of the hearing record. But, the two dimensions are not mutually exclusive. Rather, IHOs must strike a balance between them by determining the extent, if any, each step will assist in making a factual record for the IHO to render an informed decision on the presented issue(s). The reality is that most decisions under the IDEA are fact determinative.

C. Clearly, IHOs cannot give legal advice to either party, including parties that are unrepresented.[5] There are, however, additional

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Question Witnesses to Develop the Record with Pro Se Litigants (July 23, 2012) (on file with The Massachusetts Bureau of Special Education Appeals) at 1; Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant,* 27 J. Nat'l Ass'n Admin. L. Judiciary 447 (2007). However, the nature and purpose of an IDEA hearing may necessitate an IHO's involvement in developing / completing the record even when the parties are represented.

[2] 34 C.F.R. § 300.1.

[3] At least one court has found than an IHO has an affirmative duty to develop the record if mandated by enabling law. *See Lizotte v. Johnson,* 777 N.Y.S.2d 580 (2004). In *Lizotte*, the court held that a New York City Administration for Children's Services ("ACS") hearing officer "should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's *pro se* appearance and her inability to speak English." The ACS regulations require hearing officers to develop a full record.

[4] *Logue v. Dore,* 103 F.3d 1040, 1045 (1st Cir. 1997) (stating it is "well-established that a judge is not a mere umpire"). *See also Quercia v. U.S.,* 289 U.S. 466, 469 (1933).

[5] Generally, however, it is well settled that more leniency is afforded to decision makers working with unrepresented parties when handling procedural matters.

measures an IHO can take to develop / complete the hearing record. This outline offers a variety of suggestions in both of these regards to help ensure that the process achieves its primary goal of upholding the educational rights of the child. Whether an IHO chooses to implement any of them will depend on how the IHO perceives his/her role and responsibilities as an IHO and assesses the particular circumstances in each case.[6]

See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); *Merritt v. Faulkner*, 697 F.2d 761, 769 (7th Cir. 1983). *See also Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents with Children with Disabilities*, 52 IDELR 266 (OSERS 2009) (although the comments to the regulations permit a state agency to dismiss complaints that are unsigned or do not contain the parent's contact information, OSERS notes that the better practice might be to notify the parents of the defects in their complaints and allow the parent to remedy the deficiencies); *In re Student with Disabilities*, 112 LRP 36509 (SEA NY 2010) (stating that an IHO "should deal flexibly with, liberally to, and with understanding towards a *pro se* parent with respect to matters relating to procedures"). And, in the case of a *pro se* parent, there are a host of accommodations and assistance that an IHO can provide the *pro se* parent. Providing a reasonable accommodation to a *pro* se parent is not necessarily an ethical violation. *See*, *e.g.*, *ABA Model Code of Judicial Conduct R.* 22 (2007), Comment 4 (stating that a judge can make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard).

[6] Since the IDEA was enacted in 1975, the fundamental purpose of the due process hearing (i.e., to uphold the child's educational rights) has not changed. Further, the IDEA's basic provisions governing the structure of the hearing process have not changed. What has dramatically changed in the intervening four decades is who is sitting at the hearing table. Initially, IHOs were routinely educators, often college professors, and rarely attorneys. This may explain the basis for the reference in *Rowley* to the "educational expertise" of IHOs. Similarly, back then attorneys typically did not represent parties in the hearings. The hearings could best be described as conferences – a bit more formal than an IEP meeting and rarely overtly adversarial, with the discussion on the record being lead by the presiding IHO. As society became more litigious in the intervening decades, so did IDEA hearings. Parties being represented by attorneys, particularly school districts, became far more commonplace. And, states began seeking attorneys to serve as IHOs. With attorneys now often serving in various capacities in IDEA hearings, it is understandable why most attorney participants would view the process as being comparable to the process they are most familiar with – court litigation. But, an IDEA hearing is <u>not</u> like a court proceeding – not in 1975 and not today. The purpose is singular. Court rules do not apply. The rules of evidence do not apply. And, given its purpose, as in 1975, the hearing record upon which issues will be decided cannot rest solely in the hands of the parties and their attorneys / advocates, if any.

III. LEGAL AUTHORITY

A. Neither the IDEA nor its implementing regulations directly addresses whether an IHO has the authority to develop / complete the hearing record. Arguably, however, the IDEA implicitly requires an IHO to develop / complete the record. First, an IHO's "determination of whether a child received a FAPE must be made on substantive grounds."[7] Further, an IHO is given the authority to request an independent educational evaluation.[8] And, last, in a two-tier system, like New York, the reviewing officer must "[s]eek additional evidence if necessary."[9]

B. Whether an IHO under IDEA has the authority to engage more fully in the hearing process appears clear to OSEP. The IDEA sets forth the specific rights accorded to any party in a due process hearing.[10] According to OSEP, a hearing officer is charged with the specific responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing." It is further expected that the hearing officer "ensure that the due process hearing serves as an effective mechanism for resolving disputes between parents" and the school district. In this regard, apart from the hearing rights set forth in IDEA, "decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer," subject to appellate review.[11] And, the generally applicable standard of review is abuse of discretion, which typically favors the hearing officer.[12]

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[7] *See* 34 C.F.R. § 300.513(a).
[8] *See* 34 C.F.R. § 300.502(d).
[9] 34 C.F.R. § 300.514(b)(2)(iii).
[10] *See, e.g.*, 34 C.F.R. § 300.512.
[11] *Letter to Anonymous,* 23 IDELR 1073 (OSEP 1995). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, pages 46704-46706 (stating, in pertinent part, "the specific application of those procedures [regarding pre-hearing and decisions] to particular cases generally should be left to the discretion of hearing officers who have knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing.").
[12] *See, e.g.*, *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692,709 (10th Cir. 1998); *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct. 2010). *Cf. J.W. v. Fresno Unified Sch. Dist.,* 611 F. Supp. 2d 1097, 1109 (E.D. Cal. 2009) *aff'd* 626 F.3d 431 (9th Cir. 2010) (court gave "due weight to ALJ's decision" after "ALJ questioned many witnesses, both to clarify responses as well as to elicit

C. New York explicitly grants an IHO the authority to "ask questions of counsel or witnesses for the purpose of clarification or completeness of the record."[13]

IV. IF SO, WHEN AND HOW?

A. To preserve both the appearance and actual impartiality while developing / completing the hearing record, keep the following practices in mind.

B. It cannot be over emphasized that for many reasons the prehearing conference (PHC) is usually the most important strategy an IHO can use to help the parties and their representatives, if any, understand and navigate the hearing process. So, hold one. It is at the PHC that an IHO begins to set expectations on what evidence s/he will need to decide the presented issue(s). For unrepresented parents, a PHC is arguably "essential to accord [them] a meaningful opportunity to exercise [their] rights during the course of the hearing."[14]

C. Prior to the prehearing conference, the IHO should become familiar with the applicable standard(s) regarding the issue(s) to be decided. Having this familiarity will help the IHO to have an understanding of the evidence s/he should expect to receive during the hearing. At the prehearing conference itself, when reviewing the issue(s) to be decided, the IHO should engage the parties in a discussion on what evidence is needed for the IHO to decide the issue(s). This practice serves various purposes. First, it confirms for the IHO the applicable standard(s) or, in the event of disagreement, it affords the IHO an early opportunity to rule on the applicable standard(s), which would allow the parties adequate time to prepare for the hearing. Second, this simple exercise would require the parties – especially when the IHO provides advance notice of what is to be accomplished during the PHC – to get a jumpstart on thinking

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follow up responses"); *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 942 (9th Cir. 2007) (court treated "hearing officers findings as 'thorough and careful' when the hearing officer participate[d] in the questioning of witnesses"); *M.M. v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 398773 (N.D. Cal. Feb. 7, 2012) (court in deferring to ALJ's fact findings noted the ALJ was "thoroughly engaged … asking numerous follow-up and clarifying questions of the witnesses through out"); *S.A. v. Exeter Union Sch. Dist.*, No. CV F 10-347 LJO SMS, 2010 WL 4942539 (E.D. Cal. Nov. 24, 2010) (court finding that "although the ALJ actively questioned [the superintendent] for a lengthy period of time, there [was] no evidence that the ALJ inappropriately credited her responses").

[13] 8 NYCRR § 200.5(j)(3)(vii).

[14] *Letter to Anonymous,* 23 IDELR 1073 (OSEP 1995).

about the documentary evidence and witnesses each would have to present to prosecute or defend against the claim(s). Third, it would provide a basis – as more fully discussed below – for the IHO to highlight and address any perceived deficiencies in the hearing record during the course of the hearing and prior to the record being closed.

D. The typical due process complaint includes a myriad of concerns the parent has regarding his/her child's education. Presenting these concerns in an understandable and logical sequence can be difficult for any individual, including seasoned attorneys.

Nonetheless, the importance of an IHO having a comprehensive understanding of the precise question(s) that s/he must answer after the hearing record has been closed cannot be overstated. When the IHO understands what it is that is being asked of him/her, the IHO is in a better position to extract the necessary evidence that will enable him/her to decide an issue/defense and to craft an appropriate remedy, when necessary. The PHC affords the IHO an early opportunity to confirm his/her understanding of the presented issue(s) to be decided (i.e., the precise question(s) to be answered) and the proposed remedies being requested.

The discussion regarding clarification of the issues has other benefits as well. It allows, as stated above, the IHO to lead a discussion on what should be shown/presented for the IHO to be able to determine the presented issue(s). This discussion is extremely important in helping to ensure a complete record and can be of assistance to the parties in properly preparing for the hearing.

When clarification is necessary, obtaining it must be done with great care, and the IHO should first explain to both the school district and the parent how the requested information will help the IHO with understanding what s/he is being asked to do. It may be necessary for the IHO to remind the parties that the PHC is not the time for the presentation of evidence.

E. While in no way asking the parties to present their case, some general discussion regarding who the parties might call as witnesses and what documents they might submit offers the IHO the opportunity to help shape the quality of the presentations.

F. An IHO should spend time explaining the many details of the process during the PHC. Many of these process matters have a direct impact on the quality of the hearing record that is ultimately

created, e.g., the five day rule[15] (i.e., affects what evidence a party may seek to introduce into the hearing record), the possible option of telephone testimony (i.e., allows a party the option to present a critical witness who would otherwise not be available for in-person testimony), the right to subpoena witnesses and how and when to do it (i.e., ensures that critical witnesses are available to provide testimony on the dates set for hearing), motion practice (i.e., helps, for example, to determine the scope of the hearing, admissibility of contested evidence, etc.), the format of the hearing (i.e., provides structure to the parties and helps them to plan their presentations), the burden of proof (i.e., defines the duty place upon a party to prove or disprove a disputed fact and the quantum of proof the party with the burden must establish to prevail), and the need for the parties to let you know before the hearing if problems arise (i.e., staves off problems that might directly impact the creation of an adequate hearing record).

G. Prior to the hearing, the IHO should review the results of the PHC (and 5-day disclosures, if requested ahead of the hearing) in order to be prepared and engaged in the questioning of witnesses. Whether, and to what extent, an IDEA IHO has the duty or obligation to develop an incomplete hearing record was discussed above. How the IHO does it, is just as important as if the IHO does do it. Care should be taken that the questions are unbiased and presented in a manner that does not reveal the IHO's concerns for a particular witness' credibility or the merits of the case. Here are some strategies to consider when the need to clarify / complete the hearing record arises:

1. During the course of the hearing, the IHO should be sensitive to offering the parent / district representative / attorney breaks to collect his/her thoughts and get organized. It can sometimes actually speed things up, and lead to a complete hearing record.

2. When a witness is called to the stand (for either party), ask of the parent / district representative / attorney what things/points s/he intends to question the witness about. This gives the IHO the chance to rule on irrelevant areas and subtly inquire if other areas that should be addressed are going to be addressed. In short, this approach assists in the party presenting relevant testimony and increasing the chances that a complete hearing record is made.

[15] 34 C.F.R. § 300.512(b).

3. The IHO may have the responsibility to question a witness when the parent / district representative / attorney is struggling to conduct a meaningful examination of the witness. If the parent / district representative / attorney is struggling, the IHO may ask him or her what information s/he thinks the witness can provide (maybe dismissing the witness from the hearing room during the discussion) and suggest the form of the question(s). Alternatively, the IHO may want to consider asking the parties if s/he (the IHO) might ask the question(s).[16] Often there will be no objection. In any event, the IHO's assistance should be directed towards accomplishing the party's own strategy, not in suggesting a different or better strategy.

4. When the IHO is considering asking a question / line of questions,[17] requesting to review certain documents or even calling a witness,[18] the IHO should explain why s/he thinks such is necessary / relevant and should get the party's reaction. A party will often agree to the IHO's request once it understands the IHO's concern(s) and offer to take action to try to satisfy it. An IHO should allow the party to take the lead because it significantly reduces the IHO's risk of real or perceived partiality. If the party still does not fill in the evidentiary void, the IHO can then ask clarifying questions. Should the party not agree and objects, the IHO may proceed

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[16] *See Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984). In *Oko*, the appellate court upheld a trial judge who stopped a *pro se* defendant's narrative testimony and directly questioned the *pro se* defendant and directed the defendant on how to properly form a question on cross examination. After the plaintiff objected several times to the *pro se* litigant's questions, the *pro se* litigant asked, "Is there any way I can accomplish that?" The trial judge advised the pro se litigant, "Ask him what is customary." The appellate court, in upholding the trial judge's actions, stated, "As any judge or lawyer knows, the conduct of a jury trial with a *pro se* litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge…. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides." *Id.* at 661. The dissent, while sympathetic, nonetheless disagreed, stating, in part: "To condone such actions of the trial court here is to invite *pro se* representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose." *Id.* at 662.

[17] *See* Fed. R. Evid. 614(b) (allowing a judge to examine "a witness regardless of who calls the witness"). Reference to the Federal Rules of Evidence is by way of analogy.

[18] *Id.* (also permitting a judge to call a witness).

but should explain that s/he is doing so in order to complete the hearing record to determine an issue and not to reflect an opinion or be an advocate for a party. The IHO should also advise that the parties can object to any question and allow each party the opportunity to respond to what the IHO has done by way of cross or additional testimony.

5. Another possible option to complete the record in some situations is for the IHO to order an independent educational evaluation ("IEE").[19] But, usually to do so presents problems in meeting the 45-day timeline even if previously extended because an IHO cannot initiate his/her own additional extension.[20]

V. RECORD CLOSE DATE

A. The IHO determines when the record will be closed. No further extensions of the decision timeline can be granted after the record close date.[21]

B. The IHO has the discretion to revise the record close date, provided good cause exists to do so. The revised record close date, however, cannot extend the date the decision is due.

C. Good cause may exist, for example, when the IHO determines that additional clarification is required after the parties have submitted their post-hearing briefs or when an unanticipated event has prevented a party from submitting their written submission within the agreed upon timeline.

D. The IHO should consider the following matters when setting the record close date:

1. The time required for a transcription of the hearing to be made available to the IHO.

2. Whether post-hearing written submissions are required to assist the IHO in understanding the legal arguments of the parties. It is within the discretion of the IHO whether to

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[19] 34 C.F.R. § 300.502(d).
[20] *See* 34 C.F.R. § 300.515(c) ("A hearing … officer may grant specific extensions of time … at the *request of either party*.") (emphasis added); 8 NYCRR § 200.5(j)(5)(i) ("The impartial hearing officer shall not solicit extension requests or grant extensions on his or her own behalf or unilaterally issue extensions for any reason.").
[21] 8 NYCRR § 200.5(j)(5)(iii).

permit the parties to submit post-hearing memoranda of law.

3. The complexity of the issues that will be addressed in the parties post-hearing submissions.

4. The schedule for the submission of post-hearing memoranda of law (i.e., simultaneous submissions; sur-replies).

VI. PRESERVING THE INTEGRITY OF THE HEARING RECORD

A. Establishing an accurate record is one of the IHO's most important responsibilities. The record is extremely important if the decision is appealed. What makes up the record has been the subject of great debate. Following are best (and required[22]) practices for the IHO to consider.

B. General Rules.

1. The IHO should be mindful of problems that will adversely affect the record of the hearing being made, such as problems with the recording device, witnesses not speaking loud enough (particularly when on the phone), overlapping conversations, use of acronyms, proper spelling of names, questioners/witnesses referring to exhibits without citing to exhibit numbers, and the use of clarifying gestures.

2. Endeavor to mark all items as an exhibit of a party or of the IHO (for ease of identification and reference).

3. Do not markup exhibits or legal memoranda. Instead, make copies and mark up the copies. The record should only include the unmarked submissions.

4. Date stamp all documents received.[23] This would assist with establishing timelines.

5. Before each witness leaves the witness stand, the IHO should check with counsel as to whether any exhibit marked but not admitted is being asked to be admitted or not. Should the IHO be unsure of what marked exhibits are admitted or not at the end of a party's case or at the end of the hearing, the IHO should check with counsel to clarify their status and

[22] Requirements pursuant to the Regulations of the Commissioner of Education are identified as such in the footnotes and accompanying text.
[23] Alternatively, append the forwarding email to any attached document(s) for submissions that are made by electronic mail.

return to counsel any exhibits not to be admitted.

6. Requests for an extension of the 45-day timeline should be documented in writing, and the reasons given should be incorporated in the order, which must be in writing and made part of the record.[24] In addition to the good cause reason for the request, the written order should include the analysis required pursuant to 8 NYCRR § 200.5(j)(ii), (iii), as appropriate, and, if the request is granted, the new decision date.[25]

7. Prior to the five-day disclosure deadline, review and organize the documents in the file with an eye towards providing the parties/counsel with a list of IHO exhibits, which may include all correspondence, pleadings, motions/requests, orders or other tangible items that have been submitted to date. Provide the parties/counsel with an advance copy of the IHO Exhibit List and advise that the list will be discussed at the start of the hearing.[26]

8. Prior to the start of the hearing, and after discussing exhibits with the parties/counsel, review the IHO Exhibit List with the parties/counsel and address any concerns that are raised.

9. The record should not include documents or other tangible, non-documentary items that were not filed directly with the IHO.

10. The IHO decision must include a list identifying each exhibit admitted into evidence, providing the date, number of pages, and exhibit number or letter. The decision shall also include an identification of all other items the IHO has entered into the record.[27]

11. Items that are not admitted into the record, but which are to be made part of a separate record for purposes of an appeal, should be clearly marked and kept together (e.g., in a labeled envelope). Note in the IHO decision what proposed exhibits make up the separate record.

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[24] *See* 8 NYCRR § 200.5(j)(5)(i), (iv).
[25] *Id.*
[26] Even if this approach is not used, it is good practice to discuss with the parties/counsel prior to the start of the hearing what pre/post-hearing documents will be part of the record.
[27] 8 NYCRR § 200.5(j)(5)(v).

B. Contents. The complete record should consist of the items identified in section 200.5(j)(5)(vi), as appropriate and as determined by the facts and circumstances of each case.[28]

C. Certification. After a final decision has been rendered, the IHO must certify the record and transmit it to the school district.[29]

D. Timeline. The record must be transmitted promptly to the school district.[30] The expectation is that the record will be provided to the school district within one week of the decision being provided to the parties.

E. Reported Common Clerical Mishaps.

1. Failure of the IHO to index papers received by the IHO during the course of the hearing.

2. Marking evidence for identification but tabling its admission into evidence to a later point during the course of the hearing then forgetting to address whether it is received into evidence.

3. Spotty or inaccurate pagination of exhibits.

4. Allowing excerpts of documents without clarifying on the record that excerpts have been admitted and how many pages are in each excerpt.

5. Handwritten notes / markings being added to the margins of exhibits without any indication in the hearing record when the notes / marking occurred, who added them, and why.

[28] 8 NYCRR § 200.5(j)(5)(vi).
[29] 8 NYCRR § 200.5(j)(5).
[30] *Id.*

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